89- 1486

No. __________

IN THE SUPREME COURT OF THE UNITED STATES

October TERM, 1989

ALBERT E. ACKROYD, M.D.,
Petitioner

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Indian Springs State Bank,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February 12, 1990

QUESTION PRESENTED

Whether the D'Oench-Dhume doctrine, which states that agreements between a federally insured lending institution and a borrower which are: (1) oral, (2) secret, and (3) side agreements, are not enforceable against the insurer, may be applied to an agreement which is in writing and kept in the bank's files, making the agreement neither oral nor secret.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Albert E. Ackroyd, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on November 13, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is unreported and is reprinted in the appendix A hereto, p. 1 infra. The memorandum decision of the United States District Court for the District of Kansas (O'Connor, J.) has not been reported. It is reprinted in the appendix B hereto, p.

1, infra.

JURISDICTION

Jurisdiction to review by writ of certiorari the opinion and judgment of the United States Court of Appeals for the Tenth Circuit, issued November 13, 1989, is invoked under 28 U.S.C. 1254(1).

LAW INVOLVED

This case concerns an interpretation of D'Oench, Duhme Company, Inc. v. FDIC, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942).

STATEMENT OF THE CASE

On November 1, 1982, Dr. Ackroyd executed a note payable to Indian Springs State Bank ("ISSB") in the amount of $100,000. He directed ISSB to deposit the loan proceeds into the accounts of two limited partnerships, Haiku Holdings and Haiku Partners, at ISSB, thus purchasing his interests in the two limited partnerships. A written agreement in the files of the bank stated this note and others would be rolled over for a period of three years on certain conditions. However, the note was called for

repayment in March, 1983 at the insistance of the FDIC in violation of the note and the agreement. On January 27, 1984, the Kansas State Bank Commissioner determined that iSSB was insolvent. The bank commissioner ordered ISSB closed and the FDIC accepted appointment as receiver of the bank. The FDIC was also substituted as plaintiff in the lawsuit. Ultimately, the FDIC amended its complaint to include two different counts against Dr. Ackroyd. Count I was a demand for payment on the note; Count II charged Dr. Ackroyd with civil fraud for his involvement in acquiring the loan. Ackroyd answered and counterclaimed against the FDIC.

On July 30, 1985, the FDIC filed for summary judgment on Count I. This motion for partial summary judgment was premised, inter alia, on "the defendant not having any agreement for repayment or that the note should be rolled over", and that the doctrine established in D'Oench, Duhme Company, Inc. v. FDIC, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942) estopped the affirmative defenses

March 6, 1987, the district court sustained the FDIC's motion for summary judgment on Count I. The FDIC filed for summary judgment on Count II for fraud and Ackroyd's counterclaims on April 16, 1987. Dr. Ackroyd failed to respond to the motion and it was sustained on June 22, 1987. During the period of June 13-15, 1988, the FDIC pursued punitive damages against Dr. Ackroyd for fraud. The jury returned a verdict awarding no punitive damages. On July 1, 1988, the district court rendered final judgment on Counts I and II in favor of the FDIC. Appeal of this judgment was noticed by Dr. Ackroyd on July 27, 1988.

The United States Court of Appeals for the Tenth Circuit, invoking subject matter jurisdiction based upon 28 U.S.C. 1291, entered its order and judgment on November 13, 1989. This Court reversed the summary judgment against Ackroyd on FDIC's fraud claim and dismissed it without prejudice. They found there was a disputed issue of

material fact as to Ackroyd's intent to commit fraud, which precluded summary judgment. However, this Court did affirm the summary judgment as to the FDIC's suit on the note. They applied the D'Oench doctrine to the defendant's affirmative defenses based on such a collateral agreement. "To permit the defendant to rely upon a collateral agreement as a defense to that note would directly contravene the policy behind the D'Oench doctrine of protecting the FDIC's interest."

REASONS FOR GRANTING THE WRIT

I. The Court Below Has Decided an Important Federal Question Which Has Not Been Settled By This Court.

FDIC v. Ackroyd presents important federal questions regarding the application of the D'Oench doctrine as established by this Court in D'Oench, Duhme and Company v. FDIC, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). The courts below have continually broadened the scope of the doctrine so that the FDIC is granted more power and protection than originally intended

by this Court. One commentator has noted that this expansion goes beyond that which is either necessary or desirable and occurs at the expense of innocent, good faith borrowers who are barred from asserting their defenses. Hymanson, Borrower Beware: D'Oench, Duhme and Section 1823 Overprotect the Insurer When Banks Fail, 62 S.Cal.L. Rev. 253, 255 (1988).

In particular, the courts below have extended the principles of equitable estoppel in D'Oench to estop an individual from asserting his defenses against the FDIC when there was a collateral agreement which was neither oral or secret. This Court's recent decision in Langley v. FDIC, 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987) dealt with the situation in which the FDIC, acting in its corporate capacity, brought action against makers for nonpayment of a note under the statutory codification of D'Oench in 12 U.S.C. 1823(e). The petitioner's defense was barred because it did not meet the basic requirements of that statute, i.e. that the agreement be in writing (not oral) and a part

of the bank's records (not secret).

In the instant case, the FDIC is suing, as receiver, to recover on a note, hence the statute does not apply. The collateral agreement in question here was written and was a patently public part of the bank's records. Yet, the court below applied D'Oench to estop the petitioner from asserting his defenses. This issue is in great need of resolution by this Court today in light of the monumental amount of litigation arising out of the alarming rate of bank closures.

The FDIC was born amidst the rubble of this same type of economic collapse in 1933. During the next ten years, some 490 banks were closed due to financial difficulties. Platt and Darby, A Primer on the Special Rights and Immunities of the Federal Deposit Insurance Corporation, 11 O.C.V.L. Rev. 683 (1986). That same article pointed out that the number of bank closures due to financial difficulties dwindled dramatically over the next forty to fifty years, only to rise

sharply again in the 1980s. The seminal case to develop out of that early period was D'Oench.

In D'Oench, the plaintiff executed a note in favor of a bank in order to deceive a bank examiner by falsely inflating the bank's assets. The maker and the bank had a separate agreement, whereby the bank would not seek to enforce the note. This agreement, however, was not recorded in the bank's records for obvious reasons. A year later, in 1934, the FDIC was informed of and relied upon the bank examiner's sanction in granting insurance protection to the bank. In 1938, the bank acquired a loan from the FDIC to remain solvent, and the corporation acquired the plaintiff's note as collateral for the loan. When the bank finally failed, the FDIC sought to enforce the note and the plaintiff protested upon the basis of the "oral, secret, side agreement" and upon the ground that the note had been issued without adequate consideration. This Court held that the note was enforceable in the hands of the

FDIC.

In D'Oench, this Court formulated a rule of federal common law in order to promote the public interest in preserving and protecting the FDIC from certain claims asserted by borrowers against the FDIC as successor in interest to a failed bank. Basically, the doctrine presents a bar to any claims or defenses asserted by a borrower and officers or representatives of the failed bank which are not reflected in the loan documents in the lending files of the failed institution. One purpose for the doctrine is to facilitate the duties of the FDIC in its takeover of a failed financial institution by allowing it to rely only on the written records of the failed bank and by protecting it from extraneous claims and defenses of which the regulatory agency could have no knowledge. The test for application of D'Oench to a particular case is whether there was a secret agreement which was designed to deceive either the bank's creditors or the public authority.

Essentially, D'Oench sets forth a threefold requirement for the FDIC to be able to bar a borrower's defenses. There must be an oral, secret, side agreement. Ackroyd does not meet these requirements. The letter from bank president LeMaster to general partner Winkler sets up the additional terms of the agreement not on the face of the note. It is clear that Winkler is representing the limited partners, one of which was Ackroyd. This letter was from the president of the bank himself. There was nothing secret about it. It was part of the bank's records. Ackroyd's defenses should not have been barred by D'Oench since this agreement was neither secret or oral. As can be seen in the judgment from the court below, judgment on the fraud claim against Ackroyd was reversed. The lower court has expanded and misapplied D'Oench to estop the petitioner from asserting his defenses against the FDIC. It is extremely important that this Court settle this vital issue so that the Tenth Circuit and others don't continue to

propagate this mistake.

In another case in a district court in the Tenth Circuit, purchasers of limited partnership interests brought an action against the FDIC, as receiver of the bank which had financed the limited partnerships. In re Longhorn Securities Litigation, 573 F.Supp. 278 (W.D.Okla. 1983). FDIC made a Rule 12(b)(6) motion that the plaintiffs were precluded from advancing their claims against the FDIC by D'Oench. That court observed there were four elements necessary for them to assert the D'Oench estoppel: (1) the FDIC must be the party against whom the claim or defense is asserted, and (2) the party asserting the claim or defense must have lent himself (3) to a secret agreement (4) that deceived or would tend to deceive the FDIC. Based on Longhorn, D'Oench does not apply to estop them from asserting their claims. Yet, here D'Oench was applied. Thus, even within this Circuit there seems to be a difference of opinion regarding the application of the D'Oench doctrine.

The court in In re Longhorn noted that those cases bear a close resemblance to FDIC v. Meo, 505 F.2d 790 (9th Cir. 1974), in which the Ninth Circuit Court of Appeals refused to apply the equitable estoppel doctrine of D'Oench. In that case, Meo executed a promissory note to a bank to purchase 1,000 shares of their common stock. Instead of properly executing the order, however, the bank issued voting trust certificates. Meo never became aware of the deception because the bank held the certificates as security for the loan. When the bank became insolvent, the FDIC was appointed as receiver and sued on the note. The district court, basing its decision solely on its determination that public policy favors bank depositors over bank borrowers, held Meo liable on the note. On appeal, D'Oench was held to be inapplicable because Meo was a bona fide borrower and was innocent of any wrongdoing or negligence. The court held, "[w]e conclude that a bank borrower who was neither a party to any

deceptive scheme involving, nor negligent with respect to, circumstances giving rise to the claimed defense to his note is not estopped from asserting such defense against the bank's receiver." By the same token the same reasoning, rather than D'Oench, ought to be applied to Ackroyd. The FDIC, in Meo, argued for D'Oench to be applied broadly as in the Ackroyd case in the Tenth Circuit so that Meo could not assert his defenses.

There are several other cases where the courts did not apply D'Oench to estop the maker of a note from asserting his defenses. In a case in bankruptcy court in the Southern District of Texas, the FSLIC brought adversary proceedings to recover on a note executed by the debtor in favor of the insolvent bank. In re Hunter, 100 B.R. 321 (Bkrtcy. S.D. Tex. 1989). Hunter executed two promissory notes in favor of the bank. He obtained the loans to finance the development of real property. Both of the notes were secured by deeds of trust and security agreements upon the real property.

In addition, Hunter and the bank executed two identical pre-development loan agreements which set forth obligations of both parties in connection with the loans. Both pre-development loan agreements provided for funding by the bank, upon application of Hunter, of the interest due on the notes, as well as certain other development costs. The pre-development agreements provided that the principal balance on each note would be due in 1988.

Hunter began development of the real property and, in the course of development, submitted draw requests as specified in the pre-development loan agreements on a monthly basis. Hunter was never declared in default under the terms of the notes from October 1985 through March 1986. Then, Hunter submitted a monthly draw request, as before, and the bank refused to fund the request and did not pay the interest as it had done in past months. Shortly thereafter, the FSLIC was appointed receiver for the bank and, although aware of the provision in the pre-

development loan agreements, would not fund the interest payment. As a result, the FSLIC declared the notes in default, foreclosed on the property, and purchased the property at the foreclosure sale.

Later, the FSLIC sued to collect on the amount remaining on the notes. Hunter asserted a number of affirmative defenses and counterclaims. Among them he asserted that the FSLIC breached the pre-development loan contract resulting in a wrongful foreclosure because he was not actually in default at the time the FSLIC accelerated the loans. The FSLIC in turn asserted that D'Oench barred Hunter's affirmative defenses and counterclaims.

After considering the doctrine, that court observed it was subject to some limitations. It stated, "[w]here a note or written agreement imposes bilateral obligations on the parties in addition to the obligation by the maker to pay a sum certain, the borrower may assert such claims or defenses against the FDIC or FSLIC." See

FDIC v. McClanahan, 795 F.2d 512, 515 (5th Cir. 1986); Howell v. Continental Credit Corp., 655 F.2d 743 (7th Cir. 1981). The Hunter court held that any defenses which arose out of an oral, secret, side agreement between bank representatives and Hunter were barred. However, the court did not apply D'Oench to bar the defenses which were premised on an alleged breach of the terms of the written, public pre-development loan agreement by the FSLIC, not the failed bank. The court stated:

> These defenses do not have their origins in any secret or side agreements between Hunter and Mainland which would have the effect of misleading or defrauding FSLIC; in fact these defenses are based on notes and predevelopment loan agreements, as written, and FSLIC's actions which were premised on them. The loan agreement was not extraordinary and there was no culpability or negligence on the part of Hunter. The defenses arise out of the terms of the bilateral agreement which Hunter alleges created an obligation on the part of the bank and/or FSLIC to fund certain monies to Hunter,

including interest charges
upon his application.

In re Hunter, supra at 326.

Certainly, there are similarities between Hunter and Ackroyd. Ackroyd himself did not execute the pre-development loan agreement with the bank, but it was done on his behalf as a limited partner by one of the general partners. As here, the bank did not give Ackroyd and his partners time for their real estate deal to work. As in Hunter, the agreement in Ackroyd was not an oral, secret or side agreement. Nor was there any wrongdoing or negligence on the part of Ackroyd. Therefore, Ackroyd, as in Hunter, should not have been barred from asserting his defenses. D'Oench should not have applied. Yet, it was. It will continue to be misapplied until this Court clearly defines or adapts either the three elements set forth in D'Oench or the four elements set forth in Longhorn as elements, not suggestions. Such definition will resolve a burgeoning amount of litigation.

Another recent case in which the court

ruled D'Oench did not apply was where FDIC brought action against a political candidate, his campaign coordinator, and campaign committee, on a promissory note executed by the coordinator as agent for the committee. FDIC v. Tennesseans For Tyree, 886 F.2d 771 (6th Cir. 1989). FDIC claimed, among other things, that the defendants were liable because they engaged in conduct likely to mislead banking authorities in violation of D'Oench. The campaign chairman signed the note after being orally assured that he would incur no personal liability on the note. FDIC argued that the agreement between the candidate, the campaign chairman and the bank that the signer would not be personally liable was a secret agreement and was a deceptive scheme subjecting him to personal liability. The court rejected this argument, saying that the note was signed in a purely representative capacity. The court held, therefore, that the so-called secret agreement was irrelevant since the signer was not using the agreement as a defense. While

certainly Ackroyd was not signing a note in a representative capacity, he was signing based on a collateral agrement which was public and in writing that the note would be rolled for a period of three years. This was not a secret agreement nor was it a deceptive scheme that should subject him to personal liability, without the benefit of defenses which are available to any other citizen.

The Illinois Attorney General brought an action on behalf of the People of the State of Illinois against Commonwealth Mortgage Corp. of America, alleging violations of Consumer Fraud and Deceptive Business Practices Act and Uniform Deceptive Trade Practices Act. People, ex rel. Hartigan v. Commonwealth Mortgage Corp., 723 F.SUpp. 1258 (N.D.Ill. 1989). That court found D'Oench precluded any claim for recovery based on oral misrepresentations by Commonwealth or its agents or employees. They acknowledged the limited context in which D'Oench was announced and the restricted scope of its quoted pronouncement, but also stated that

the rationale that produced D'Oench has since been expanded in a number of ways. The court stated, "[a]t least as importantly for current purposes, the policy notions underlying D'Oench have been applied far more broadly than its narrow origins would suggest -- its sweep now extends to any private understandings not memorialized in the lender's files." People, ex rel. Hartigan, supra at 1261. D'Oench prevents any claims for damages or relief based on oral misrepresentations made by Commonwealth in obtaining the loan agreements. In dicta the court did state, "[b]y contrast, if and to the extent any alleged limitations on enforceability were reflected in Commonwealth's written records as part of an agreement with a borrower, claims asserting those limitations would remain viable." Id.

Many courts have expanded this Court's original holding in D'Oench to preclude the maker of a note from asserting any affirmative defense to liability on a note any time the maker asserts any collateral

agreement as a defense. This preclusion has occurred in a variety of situations. Theinstant case is one such situation. Such an application goes far beyond the original intent of D'Oench. Such an extension of D'Oench is neither fair, reasonable or necessary. It has created unpredictability in what is now one of the most heavily litigated areas of law. Dr. Ackroyd's situation is typical of many in this serious era of financial institution closures. Yet, the courts are not all resolving this issue in the same manner. In many situations noted above, D'Oench was found not to apply. Other courts expand D'Oench more broadly. This Court has, in Langley, dealt with related issues in the context of the codification of D'Oench as it applies to FDIC in its corporate capacity. Yet, such interpretation and clarification has not been provided under this 48 year old doctrine. Dr. Ackroyd and many other well-meaning borrowers deserve to have the issue resolved for them so they find themselves at the mercy of whichever court

they happen to be fortunate or unfortunate enough in which to appear.

The insurers deserve the same predictability. The D'Oench doctrine was designed to protect bank insurers and bank depositors. But, at the same time, it was rooted in equitable principles. Many courts have lost sight of this source and have greatly expanded and misapplied the doctrine as a blanket protection of the FDIC. Borrower Beware, supra at 255. Marsha Hymanson argues in the above cited article, "[i]n a federal program designed to spread the cost of bank failures through the use of an insurance fund, there is no justification for protecting the fund at the expense of innocent borrowers." Id. at 318. Certainly, the flood gates should not be thrown open, but innocent borrowers do require some protection. They should be allowed to assert certain defenses against the FDIC when they are not a party to an oral, secret side agreement. If all three elements are not present, the defenses should be weighed by a

trier of fact.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully prays that the judgment of the U.S. Court of Appeals for the Tenth Circuit be reversed and that this case be remanded to the District Court with instructions to proceed with a determination of the underlying facts of this case.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ALBERT E. ACKROYD, M.D,
Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Indian Springs State Bank,
Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of February, 1990, three true and correct copies of the above and foregoing were deposited in the United States mail, first class, postage prepaid, addressed to the following:

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APPENDIX "A"

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff-Appellee,	)	No. 88-2217 (D.C. No. 88-2470-0) (D. Kan.)
vs.	)	
ALBERT E. ACKROYD, M.D., Defendant-Appellant.	)	

ORDER AND JUDGMENT [1]

Before **McKAY**, **TACHA** and **EBEL**, Circuit Judges.

After examining the briefs and appellate records, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See, Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without

[1]This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

oral argument.

This appeal arises from a case brought by the FDIC in its capacity as receiver of the Indian Springs State Bank (ISSB). The FDIC sought to collect sums due and owing on a promissory note that defendant Ackroyd executed in favor of ISSB in the context of a loan transaction. The FDIC further sought to recover tort damages for the defendant's fraudulent conduct in connection with the acquisition of that loan. The district court granted summary judgment against the defendant, holding that (1) under the principles established in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), the defendant was estopped from asserting his affirmative defenses to liability on the note because he had lent himself to a scheme that tended to deceive banking authorities; (2) such principles estopped the defendant from asserting counterclaims against ISSB based on alleged misrepresentations concerning the terms of the loan transaction; and (3) there was no

genuine issue of material fact regarding the defendant's fraud, as deposition testimony and other admissions of the defendant supporting the FDIC's motion, couples with the fact that the defendant failed to respond to the FDIC's Rule 56(e) motion, entitled the FDIC to judgment as a matter of law. The defendant appeals only from the summary judgment holding that he was guilty of fraud and from the summary judgment holding that D'Oench precluded him from asserting any defense to his note. Because defendant did not appeal from the dismissal of his counterclaims, that judgment is now final. We affirm in part and reverse in part.

Defendant Ackroyd executed a note payable to ISSB in the amount of $100,000 on November 1, 1982. On its face, the note indicates that it is due "[o]n demand, and if no demand be made, then on the 1st day of November 1983." The defendant used the proceeds of the loan to purchase interests in two limited partnerships, Haiku Partners

and Haiku Holdings. The general partners of the Haiku partnerships induced the defendant and other investors to obtain loans from ISSB to provide capitalization for the Haiku partnerships.

The Haiku partnerships did not generate sufficient profits to pay off the notes within the one year period in which they were due. Despite the fact that the face of the note clearly shows that the defendant personally executed the note and assumed liability in the amount of $100,000, the defendant claims that he obtained the loan and executed the note pursuant to oral representations that he would not be personally liable and that the note would be rolled over for an additional two years. Thus, the defendant asserts that there was a collateral agreement that does not show on the face of the note, and that he is therefore not liable on the note pursuant to this agreement.

The district court properly analyzed this case as one falling squarely within

the <u>D'Oench</u> doctrine, which holds that the maker of a note may not plead any defenses to liability under the note if in executing the note he lent himself to a scheme or arrangement with regard to that note that would tend to mislead the banking authorities. <u>See</u>, <u>D'Oench, Duhme and Co.</u>, 315 U.S. at 458-60 (1942); <u>FDIC v. Investors Assoc. X., Ltd.</u>, 775 F.2d 152, 156 (6th Cir. 1985), ("[W]e conclude that <u>D'Oench</u> estops the maker of a note from asserting any defense arising out of the fraudulent scheme, including representations made by another participant in the scheme."); <u>see also</u> <u>FDIC v. MM & S Partners</u>, 626 F.Supp. 681, 684 n. 2 (N.D. Ill. 1985). This doctrine is based on the federal policy to protect the FDIC against "misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures." <u>See</u> <u>D'Oench, Duhme and Co.</u>, 315 U.S. at 457. The face of the note in this case clearly establishes the defendant's liability and

does not in any way indicate the existence of a collateral agreement. To permit the defendant to rely upon a collateral agreement as a defense to that note would directly contravene the policy behind the D'Oench doctrine of protecting the FDIC's interest.

The defendant's argument on appeal that "subsequent evidence" in the form of a letter from the president of ISSb shows a written rollover agreement requiring this court to reverse the district court's grant of summary judgment based upon the D'Oench doctrine is unavailing. First, the defendant's claim that the FDIC perpetrated a "ruse" on the court, to the detriment of the defendant, by withholding evidence of the letter, is patently frivolous. The defendant had attached a copy of this letter as "Exhibit H" accompanying his memorandum filed on August 25, 1985, in opposition to the FDIC's motion for summary judgment, and therefore both the defendant and the district court were aware of its

existence. Second, contrary to the defendant's representation in its brief that the letter stated that "the loans <u>will be renewed</u> for another year," (emphasis supplied by the defendant), the letter merely sets forth the bank's option to renew in its discretion. The letter states in relevant part:

> The loans to the limited partners will be made for one year and at the bank's discretion and the funds being available, the loans may be renewed for another year by paying the interest and a ten percent reduction in principal will be paid in full no later than three years with the same interest and principal payment.

This letter plainly does not establish a written agreement to renew the note that would preclude application of the <u>D'Oench</u> doctrine to the defendant's affirmative defenses based on such an agreement.

The district court was in error, however, in granting a summary judgment against the defendant on FDIC's fraud claims. Although the defendant did not respond to the FDIC motion for summary judgment that fact alone did not relieve

the court of its responsibility under Fed. R. Civ. P. 56 to determine whether the materials that were submitted in support of the motion for summary judgment established that there was no genuine issue as to any material fact.

The primary issue as to which the defendant argues that there was a dispute of fact is the issue of whether he had the requisite intent to defraud the bank at the time that he signed the note. The court concluded that the evidence established fraudulent intent based principally upon the defendant's deposition testimony that he did not intend personally to repay the note. Ackroyd deposition, R. V at 99-100. However, the same deposition transcript before the court on the motion for summary judgment also reveals, or could reasonably be read to reveal, that the defendant intended not to repay the note <u>only because</u> he believed that the business investments for which the money had been borrowed would generate enough cash to pay off the notes

without requiring payment from defendant personally.

Q - At the time you signed this note, did you intend to personally repay it?

A - Certainly not.

Mr. Goldberg: Wait a minute.

A - Personally? I obviously intended that it be repaid, but by the partnership.

Ackroyd deposition, R. V at 99-100.

Q - Do you think Indian Springs State Bank would have made this loan to you had they known you didn't intend to repay it?

A - I think the answer is yes, but in our concept that's what they did. They expected -- they did not expect us to repay it. They expected the partnership to repay it. So the answer is yes.

Ackroyd deposition, R. I at 101.

This evidence tends to substantiate defendant's claim that he was not acknowledging an intent to renege on his obligations but rather simply stating that he believed he could legally avoid the necessity of paying off the note because it

would, in fact, be paid off through other sources.

Although the district court need not search the entire case files to determine whether there is a genuine dispute of a material fact, it must review and consider all the material that was submitted to it by the movant even if the other party filed no response. Advisory Committee Note to the 1963 Amendment to Rule 56, 31 F.R.D. 647, 648. D. Kan. Local Rule 15(c) sets forth procedures by which a respondent may challenge the assertion of undisputed facts, but when the movant's own papers show that there is a genuine dispute of material fact, summary judgment is simply not warranted under Fed. R. Civ. P. 56(c). Adickes v. S. J. Kress & Co., 398 U.S. 144, 160 (1970).

Ordinarily, we would simply affirm the summary judgment as to the FDIC's suit on the note, reverse the summary judgment against defendant on the claim of fraud, and remand for further proceedings.

However, here it appears that it is unnecessary to remand this matter because the FDIC has already obtained a judgment against the defendant on the note and it has been denied its claim for punitive damages. Defendant's counterclaims have been dismissed and he has not appealed that dismissal. Thus, there seems to be no other relief that either party could obtain in this case and a remand seems futile. Accordingly, we dismiss the FDIC's fraud claim against defendant without prejudice. This order does not, of course, preclude the FDIC from raising the fraud issue in any other proceeding if it should become relevant.

Accordingly, the summary judgment entered against the defendant on the issue of fraud is REVERSED and this action is DISMISSED.

ENTERED FOR THE COURT
PER CURIAM

APPENDIX "B"

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff, vs. ALBERT E. ACKROYD, M.D., Defendant.	)	CIVIL ACTION No. 83-2470

MEMORANDUM AND ORDER

Pending before the court is plaintiff Federal Deposit Insurance Corporation's ["the FDIC"] motion for summary judgment on Count II of its amended complaint, on defendant Albert Ackroyd's original counterclaims, and on defendant's additional counterclaim. For the following reasons, we shall grant the motion.

Before turning to the FDIC's motion, we emphasize the following general legal principles: The movant is entitled to summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). No factual dispute is "genuine" unless "a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, 91 L.Ed.2d 202, 211-212 (1986). Furthermore, the standard for summary judgment "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." Id. at 213. In addition, summary judgment must be entered, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." Celotex v. Catrett, 106 S.Ct. 2548, 2552-53 (1986). Finally, in making these determinations, the court must view the record in the light most favorable

to the nonmoving party. Bee v. Greaves, 744 F.2d 1387, 1396 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985).

I. Uncontroverted Facts.

We first note that defendant has not responded to the FDIC's motion despite an extension of time within which to do so and, thus, has not addressed the statement of facts set forth by the FDIC in its memorandum in support of its motion. Local Rule 15(c) provides that "all material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party." Id. (emphasis added). See also Fed. R. Civ. P. 56(e) ("an adverse party must set forth specific facts showing that there is a genuine issue for trial."). Because defendant has not contested, much less specifically controverted the FDIC's statement of facts, those facts are deemed admitted.

1. On or about November 1,1 982, defendant executed and delivered to Indian Springs State Bank ("ISSB") a promissory note in the face amount of $100,000.00, whereby defendant promised to pay to the order of ISSB the sum of $100,000.00, plus interest at the rate of fifteen percent per year from November 1,1 982.

2. Defendant admits that he signed the note to obtain a $100,000.00 loan in his name. The note contains no language indicating that it would be repaid by someone else.

3. Defendant admits that, at the time he executed the note, he did not intend to repay the loan evidenced by the note.

4. On its face, the note indicates that it is due on demand and that if no demand is made, then on November 1, 1983. Any different understanding defendant had of the note's due date was based on oral representations made by Sam Daily and/or Fred Figge, organizers of the partnerships in which defendant intended to invest.

Defendant did not have an agreement with ISSB personnel that he would not personally be responsible for repayment of the note or that the note would be rolled over.

5. Defendant admits that the interest rate on the note is fifteen percent.

6. Defendant admits that he directed ISSB to deposit the loan proceeds into the accounts of Haiku Holdings and Haiku Partners.

7. Defendant also admits that he executed a letter to ISSB acknowledging his understanding that the loan was being made on the basis of his personal signature. The loan was also supported by defendant's personal financial statements previously delivered to ISSB.

8. Pursuant to and in reliance on the terms of the note and the written instructions of defendant, $40,000.00 was deposited into the Haiku partners account at ISSB and $60,000.00 was deposited into the Haiku Holdings account at ISSB.

9. Defendant Ackroyd admits that he signed and executed a security agreement to secure the payment of the note.

10. In exchange for signing the note, acquiring his loan, and depositing the proceeds into the partnership accounts, defendant received an interest in Haiku Partners and Haiku Holdings.

11. The security agreement signed by defendant granted to ISSB a security interest in certain personal property located in the State of Hawaii, to-wit:

> The Debtor's entire right, title, and interest in and to those certain registered Hawaii Limited Partnerships, Haiku Holdings and Haiku Partners, including, but not limited to, Debtor's Limited Partnership interest and the rights and benefits incident thereto.

12. Defendant signed and executed financing statements, which were filed with the Secretary of the State of Kansas and the Bureau of Conveyances of the State of Hawaii. The financing statements listed defendant's interest in Haiku Holdings and Haiku Partners.

13. Defendant sent a letter to ISSB requesting ISSB to reconsider his loan application. Defendant wanted to increase his loan from $50,000.00 to $100,000.00 so that he could increase his participation in the Haiku limited partnerships.

14. As a result of representations made by Same Daily and Fred Figge, organizers of the partnerships in which defendant was seeking an interest, defendant was under the impression that he would not have to repay the note. Although he was never explicitly told that he would not have to repay the note, he believed that the partnership would repay it.

15. Payment of the note is now in default and there is a balance due of $100,000.00, plus interest at the rate of fifteen percent per annum until paid in full.

16. Demand has been made on defendant for the payment of the indebtedness evidenced by the note and defendant has refused and failed to pay the same.

17. ISSB was a banking institution organized and existing under the laws of the State of Kansas prior to January 27, 1984.

18. On or about January 27, 1984, the Kansas State Bank Commissioner determined that ISSB was insolvent.

19. Pursuant to Chapter 9, Article 19, of the Kansas Statutes Annotated, the Kansas State Bank Commissioner ordered ISSB closed, took charge of its properties and assets and tendered to the FDIC appointment as receiver of the Bank.

20. Pursuant to 12 U.S.C. § 1821(c), the FDIC accepted appointment as receiver of ISSB as tendered by the Kansas State Bank Commissioner.

21. Pursuant to Chapter 9, Article 19, of the Kansas Statutes Annotated, the FDIC, as receiver of ISSb, is the owner and holder of all ISSB assets, including those assets evidenced by the note and security agreement.

22. The following amounts are now due to plaintiff from defendant under the terms of the note:

(a) Unpaid principal in the amount of $100,000.00;

(b) Interest to and including June 5, 1985, in the amount of $24,746.59; and

(c) Interest in the amount of $41.09 per day commencing June 6, 1985, to and including the date of payment of the principal amount.

23. On or about December 30, 1985, defendant made a $45,000.00 payment to the FDIC.

24. On July 20, 1984, defendant served his Answer and Counterclaim in response to plaintiff's complaint.

25. On October 23, 1984, the court granted the FDIC leave to file its first amended complaint. In that complaint, the FDIC sought contract damages arising from defendant's failure to pay the loan represented by the note (Count I) and tort damages arising from defendant's allegedly fraudulent conduct in connection with acquiring the loan (Count II).

26. On December 17,1984, defendant filed his answer to plaintiff's amended complaint. On March 6, 1987, the court granted summary

judgment to the FDIC on Count I of its amended complaint. F.D.I.C. v. Ackroyd, No. 83-2470-O (D. Kan., unpublished, March 6, 1987).

27. In granting summary judgment to the FDIC on Count I, the court held that defendant was estopped under the principles of D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447 (1941), from asserting any of the affirmative defenses set forth in his answer because he had lent himself to a scheme that would tend to deceive the banking authorities. Ackroyd, No. 83-2470, slip op. at 12.

II. Analysis.

As noted above in the statement of uncontroverted facts, the court previously granted summary judgment in favor of the FDIC on Count I of the amended complaint. We shall now turn, seriatim, to Count II, to defendant's original counterclaims, and to defendant's additional counterclaim.

A. Count II.

The FDIC first has moved for summary judgment on Count II of its amended complaint (the fraud claim). To support its motion, the FDIC alleges that the undisputed facts establish that defendant obtained the $100,000.00 loan through various fraudulent promises and acts.

To establish fraud,

> a claimant must show that an untrue statement of material facts, known to be untrue by the party making it, or made with reckless disregard for the truth, was justifiably relied upon by the party alleging fraud and as a result of the reliance was damaged.

Hutchinson Travel Agency, Inc. v. McGregor, 10 Kan.App.2d 461, 463-64, 701 P.2d 977, 980 (1985). All of these elements are met here.

The FDIC alleges that the first element is satisfied because defendant, despite his assurances to ISSB to the contrary, never intended to repay the loan. The initial question that must be resolved is whether that misrepresentation of his intent constitutes fraud under Kansas law. The simple answer is that it does.

the result of false statements concerning present or pre-existing facts, "fraud may be predicated upon a promise to do something in the future where the promisor upon the strength of his promise receives something of value and the promisor when making the promise has no intention of ever performing." Frey v. Frankel, 443 F.2d 1240, 1243 (10th Cir. 1971). That is, the gravamen of a fraud claim "when the alleged fraud relates to promises or statements concerning future events . . . is not the breach of the agreement to perform, but the fraudulent representation concerning a present, existing intention to perform, when such intention is in fact nonexistent." Modern Air Conditioning v. Cinderalla Homes, Inc., 226 Kan. 70, 78, 596 P.2d 816, 824 (1979).

Here, defendant obviously received something of value -- the $100,000.00 loan -- on the strength of his promise to repay the loan. In his deposition, defendant was asked: "at the time you signed this note,

did you intend to personally repay it?" His answer was : "Certainly not." Moreover, because he did not controvert the FDIC's statement of fact that he did not intend to repay the loan, that fact has been deemed admitted.

Second, ISSB justifiably relied on defendant's fraudulent promise to repay. A bank quite obviously relies on a customer's promise that he will repay a personal loan backed by a personally executed promissory note when it decides to loan money to the customer. And here, that reliance is undisputed because ISSB cautiously required defendant to acknowledge in writing that the loan was backed by his personal financial assets. Thus, defendant signed a statement in which he declared:

> You are extending to me on this date a loan for the amount of $100,000 on the terms set forth in the various documents I have signed. This will acknowledge my understanding that this loan is being made on the basis of my personal signature which in turn is supported by my financial statement previously delivered to you.

Exhibit C to the FDIC's Memorandum in Support.

Further, to induce ISSB to increase the loan amount from $50,000.00 to $100,000.00, defendant wrote a personal letter to the president of ISSB, stating: "I feel that should the need arise I would have the liquidity of assets needed to make good of this note. I do not undertake the obligation lightly." That statement not only dramatizes the extent of defendant's intentional misleading of ISSB, it also demonstrates that he intentionally induced the bank to rely on his promise to repay the loan. Hence, ISSB's reliance was entirely justifiable.

Finally, ISSB (and thus the FDIC) was damaged by its reliance on defendant's fraudulent promise. The loan was not paid when due and remains unpaid.

The FDIC has, therefore, established that there are no issues of material fact concerning the elements of fraud and that it is entitled to judgment, as a matter of law,

on its fraud claim. We shall, thus, grant summary judgment on Count II of the amended complaint.

B. Defendant's Original Counterclaims.

In our previous order granting summary judgment on Count I of the FDIC's amended complaint, we applied the principles of D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447 (1942). The D'Oench doctrine provides that the mater of a note may not plead various defenses against the FDIC, if in executing the note he lent himself to a scheme that would tend to mislead the banking authorities. Id. at 458-60. Because it was clear (even when the facts were stated in the light most favorable to defendant) that he had lent himself to such a scheme -- indeed his answer makes that clear -- we held, as a matter of law, that defendant was estopped from asserting the affirmative defenses raised in his answer. The FDIC now argues that D'Oench also estops defendant from asserting his counterclaims. We agree.

defendant asserts several counterclaims: (I) Fraud and Misrepresentation; (II) Conspiracy to Defraud; (III) Negligent Misrepresentation; (IV) Breach of Contract; and (V) Rescission. These five counterclaims are based on the alleged misrepresentations made either by ISSB officials or the general partners of the partnerships in which defendant invested the proceeds of the loan. The same alleged misrepresentations also formed the basis of the affirmative defenses that we previously ruled defendant was estopped from asserting. Because the alleged misrepresentations were an integral part of the deceptive scheme to which defendant at least lent himself, each of his counterclaims arises out of that scheme.

In deciding whether defendant is barred from raising his counterclaims, the court's task is made easy because, as the FDIC states, the court has twice considered the application of the D'Oench doctrine "to identical counterclaims in litigation against

two other Haiku borrowers in circumstances identical to those at bar." In F.D.I.C. v. Chessen, No. 83-2447-O (D. Kan., unpublished, Oct. 2, 1987), we held:

> [E]ach count of defendant's counterclaim arises out of the deceptive scheme that formed the basis of defendant's affirmative defenses. Just as the D'Oench doctrine prohibits defendant from using the circumstances of the particular scheme as a shield, so it prevents him from using the particulars of the scheme as a sword in the form of a counterclaim.

Id., slip op. at 13-14. We applied that holding to very similar facts in F.D.I.C. v. Berr, No. 83-2461-O (D.Kan., unpublished, Jan 6, 1987).

The holdings of Chessen and Berr are dispositive of the issue here. Those two cases and the instant case involved an identical amended complaint, the same material facts, and identical counterclaims. Just as in those cases, defendant here at least lent himself to a scheme that would tend to mislead the banking authorities and each of his counterclaims arises out of that scheme. Accordingly, we conclude that the

D'Oench doctrine estops defendant from asserting his counterclaims and shall grant the FDIC's motion for summary judgment on those counterclaims.

III. Defendant's New Counterclaim.

The final pre-trial conference, defendant raised for the first time what is apparently an additional counterclaim. At that conference (and in the pre-trial order), defendant asserted:

> Neither ISSB nor FDIC upheld its duty to collect the security for the note or took any action against the security for the note prior to filing the instant lawsuit. In this regard, ISSB and FDIC had a duty to exercise their security rights in the limited partnership interest and collect against the assets of the limited partnerships.

Pretrial Order (Dkt. #119), at 6. The FDIC, arguing that it has no such duty, has moved for summary judgment on this new counterclaim. Because we agree, we shall grant the motion.

Section 84-9-501 of the Kansas Statutes Annotated provides:

> <u>Default; procedure when security agreement covers both real and personal property.</u> (1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as limited by subsection (3) those provided in the security agreement. <u>He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure.</u> If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in section 84-9-207. <u>The rights and remedies referred to in this subsection are cumulative.</u>

(Emphasis added.) Under this section, it is clear that "the rights and remedies are cumulative, [and that] the creditor is not forced to elect between remedies and thus is free to assert them simultaneously." <u>In Re Wilson</u>, 390 F.Supp. 1121, 1125 (D. Kan. 1975). Indeed, this court, in a related case against another Haiku investor, recognized that the FDIC need not first foreclose against the security before filing an action against the debtor. <u>See</u> <u>F.D.I.C. v. Brenesell</u>, No. 83-2447, slip op. at 5 (D. Kan., <u>unpublished</u>, May 3, 1985).

Therefore, the FDIC had no duty to proceed against the collateral and defendant's new counterclaim is without merit as a matter of law. The FDIC is, thus, entitled to summary judgment on that counterclaim.

IT IS THEREFORE ORDERED that plaintiff's Federal Deposit Insurance Corporation's motion for summary judgment on Count II of its amended complaint is granted.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment on defendant Albert E. Ackroyd's counterclaims raised in his Answer and Counterclaim is granted.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment on defendant's additional counterclaim raised in the final pre-trial order, alleging a duty to proceed first against the security for the note, is granted.

Dated this 22nd day of June, 1987, at Kansas City, Kansas.

/s/
EARL E. O'CONNOR,
Chief Judge